UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 45 | Number 1

Article 26

12-1-1966

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subject to an express condition precedent of survival, the court should distinguish contingent interests as to survivorship or unrelated conditions precedent and proceed to apply appropriate consequences depending on the nature of the contingency. The consequence could be determined by statutory enactment or by judicial adoption of a rule that survivorship will not be implied solely on the basis of an unrelated condition. For a statutory solution the Michigan statute[34] appears to be adequate.

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Insurance—Credit Life Insurance—Payment With Proceeds of Credit Life Insurance Gives Insured's Estate a Right to Subrogation Against Assuming Grantee

Plaintiff's testator purchased a truck and executed a conditional sales contract to secure time payment. Included in the time price was an amount charged for credit life insurance which the debtor authorized the seller to purchase. Subsequently the testator transferred the truck to the defendant who assumed payment of the balance remaining on the conditional sales contract. When the testator died, the insurer paid the balance and the creditor cleared title to the property. Plaintiff, as executrix and individually, sued the defendant to recover the amount paid by the insurer.[1] In reversing a compulsory nonsuit entered at the close of plaintiff's evidence, the court held that "plaintiff's evidence makes out a case against defendant entitling her husband's estate to subrogation against . . . the assuming grantee . . . to obtain payment from him of the amount paid . . . ."[2]

A creditor has an insurable interest in the life of his debtor, at least to the extent of the indebtedness.[3] Credit life insurance is

[34] MICH. STAT. ANN. § 26.47 (1957). See note 16 *supra.*

[1] Hatley v. Johnson, 265 N.C. 73, 143 S.E.2d 260 (1965).

[2] *Id.* at 84, 143 S.E.2d at 268.

[3] Miller v. Potter, 210 N.C. 268, 186 S.E. 350 (1936). See generally 2 APPLEMAN, INSURANCE LAW AND PRACTICE § 851 (1966) [hereinafter cited as APPLEMAN].

The majority of courts have held that even though the creditor procures and pays for the policy, any excess above the amount of the debt goes to the insured's estate. See 2 APPLEEMAN § 851, at 349. North Carolina apparently has not decided this point. In Miller v. Potter, *supra,* the lower court decreed that the excess should be awarded to the insured's estate. This part of the decision was affirmed, but in the meantime the parties had agreed term insurance on the life of the debtor that obligates the insurer to pay the balance owed to the creditor in the event of the debtor's death prior to payment of the obligation.[4] In reaching the result in the instant case, the court reasoned that when the defendant assumed the obligation, he became liable as principal on the debt and the testator became liable as surety.[5] After it is established that the insured was a surety on a debt on which the defendant was primarily liable, the key issue is whether payment of the debt by the insurer is the equivalent of payment by the insured surety, thus entitling the insured's estate to subrogation against or reimbursement from the principal debtor. The court decided that payment by the insurer under credit life insurance on the life of a surety, who had paid the premium, "was an involuntary payment, and should entitle insured's estate to subrogation against the assuming grantee."[6] *Betts v. Brown*,[7] cited with approval in *Hatley*, reached the same result in holding that payment of indebtedness with the proceeds of credit life insurance was, in legal effect, payment by the insured that entitled the insured's estate to subrogation against the assuming grantee. In the *Betts* case there was no allegation that the deceased paid the premiums for the insurance, so the decision of this issue in *Hatley* seems to be on a somewhat sounder basis;[8]

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to this distribution. Another statement in the same case seems to indicate that the court would allow the creditor to retain the entire amount. The court stated, "Neither the heirs at law, next of kin, nor the administratrix of the insured can sue for the proceeds of a policy payable to a third party." *Id.* at 270, 186 S.E. at 351.

[4] "Credit life insurance is declared to be insurance upon the life of a debtor who may be indebted to any person, firm, or corporation extending credit to said debtor." N.C. GEN. STAT. § 58-195.2 (1965). In effect, credit life insurance is collateral security for the debtor. See 43 TEXAS L. REV. 580, 583 (1965).

[5] *Accord*, Rector v. Lyda, 180 N.C. 577, 105 S.E. 170 (1920). This is the view adopted in a majority of jurisdictions. See Annot., 21 A.L.R. 439 (1922).

[6] 265 N.C. at 84, 143 S.E.2d at 268.

[7] 219 Ga. 782, 136 S.E.2d 365 (1964), 43 TEXAS L. REV. 580 (1965).

[8] In actuality, there are four parties who could be considered as having made the payment. They are: (1) the assuming grantee (2) the creditor (3) the insurer or (4) the insured. The court in *Betts* quickly ruled out the assuming grantee because he was a stranger to the insurance contract. The creditor was viewed as having an interest only to the extent of the amount owed.

In considering whether the insurer or the insured had made the payment, the court stated that:

> The insurance companies, of course, actually disbursed the money to the creditor. However, they acted, not as volunteers but, in compliance with their obligation, in consideration of premiums paid

the addition of evidence that the deceased paid the premiums on the policy makes the holding that payment by the insurer was payment by the insured more acceptable. Prior authority indicates the North Carolina court would reach the opposite result if the creditor procured the policy and paid the premiums. In *Miller v. Potter*[9] the creditor procured the insurance on the life of the mortgagor who subsequently conveyed to a third party who assumed payment of the mortgage debt. Upon the death of the insured, the mortgagee applied the proceeds of the insurance to satisfaction of the mortgage, whereupon the insured's estate brought an action seeking subrogation to the rights of the mortgagee against the assuming mortgagor. In refusing to allow subrogation, the court said "[W]hile the debt . . . was paid, neither Miller nor his estate paid it, and since neither paid the debt, the estate is not entitled to subrogation."[10]

Once the court determines that payment by the insurer is payment by the deceased, the surety's estate becomes subrogated to the creditor's rights against the principal debtor unless that payment was as a volunteer.[11] It would seem the courts are correct in holding that such payments are involuntary; the payment by the insurance company is payment under a legal obligation. In consideration for the premiums paid to it, the insurer is under contract to pay the amount due according to the terms of the policy.[12] In *Kincaid v. Alderson*[13] the court avoided the voluntary—involuntary issue by holding that when the surety paid the debt with the proceeds from insurance on his life, the principal debtor's obligation was not discharged but merely transferred to the surety.

If the result in *Hatley* is grounded on the fact that the insured,

> them. . . . [T]he two insurance companies acted as the conduit for the payment of the indebtedness, to us it is inescapable that payment was . . . [by the deceased].

Betts v. Brown, 219 Ga. 782, 787, 136 S.E.2d 365, 369 (1964).

[9] 210 N.C. 268, 186 S.E. 350 (1936), 15 N.C.L. Rev. 64 (1937).

[10] *Id.* at 270, 186 S.E. at 351.

[11] The doctrine of subrogation will not be applied in favor of one who acts officiously. See Boney v. Central Mut. Ins. Co., 213 N.C. 563, 197 S.E. 122 (1938) for a discussion of some of the principles that apply in determining if a person making payment acts as a volunteer. See generally 24 Va. L. Rev. 771 (1938).

[12] Betts v. Brown, 219 Ga. 782, 787, 136 S.E.2d 365, 369 (1964). The voluntariness or involuntariness of the payment in the *Betts* case was not a real issue because the assuming grantee had defaulted and the creditor had declared the entire amount due.

[13] 209 Tenn. 597, 354 S.W.2d 775 (1962).

rather than the creditor, paid the premiums, the case might call for the insured's subrogation to be pro rata rather than complete.[14] In reaching its conclusion, the court apparently assumed that the insured had paid the entire premium cost for the insurance. Since the contract price included the entire premium cost, it is arguable that each of the monthly installments included a small amount for the insurance premiums.[15] If this is true, and if the basis for the insured's right to subrogation is that he paid the premiums, then it might be that the insured's estate should be entitled only to pro rata subrogation. The estate's right to subrogation for the amount paid by the insurer should be the ratio of the installment payments made by him to the total number of installments under the contract. However, if one of the bases for allowing subrogation is to prevent the assuming grantee from in effect being a beneficiary when he has no insurable interest,[16] then the argument for pro rata subrogation has no force.[17]

It is manifest that when a situation like that in *Hatley* arises, the existence of insurance results in a windfall to either the insured's estate or the assuming grantee. In *Tighe v. Walton*[18] the court recognized this certainty and pointed out that the recipient should be the party with the higher equitable claim.[19] It seems that in the instant case equity should award the windfall to the insured's estate rather than to the assuming grantee, who had no interest in

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[14] The surety normally is not entitled to subrogation unless he has paid the entire debt because it affects the creditor's rights, but where the entire claim has been paid, the surety is entitled to be subrogated to the creditor's rights pro rata. *E.g.*, Borserine v. Maryland Cas. Co., 112 F.2d 409 (8th Cir. 1940); Journal Publishing Co. v. Barber, 165 N.C. 478, 81 S.E. 694 (1914).

[15] Record, p. 17.

[16] See Kincaid v. Alderson, 209 Tenn. 597, 354 S.W.2d 775 (1962). The court felt that under the usual definitions, the assuming grantee could not be considered to have an insurable interest in the life of the original debtor.

[17] If the court refuses to allow pro rata subrogation because of the assuming grantee's lack of insurable interest in the life of the original debtor, it would seem the assuming debtor should be allowed to set off the amount of premiums he has paid or agreed to pay.

[18] 233 Miss. 781, 103 So. 2d 8 (1958).

[19] In holding that the payment of the insurance inured to the benefit of the beneficiary, the court said of the assuming grantee:

> To allow him to receive the benefits of the insurance policy by its discharge of the deed of trust, which he had obligated himself to pay, would certainly constitute an undeserved bounty to him. . . . Truly he would be unjustly enriched, if in fact, there is any other person who has a legal or equitable claim to the . . . policy.

Id. at 791-92, 103 So. 2d at 12.

the insurance policy and no insurable interest in the deceased. The defendant has the truck in return for the agreed consideration of paying the debt he assumed. At the same time, the insured's estate receives what he bargained for—the debt on the property has been paid by the defendant as he agreed to do. In concluding that the estate was entitled to subrogation, the court said:

> If such payment by the insurer were allowed to cancel the primary defendant debtor's obligation, under the assumption agreement . . . the defendant, the primary debtor, would in effect be made a beneficiary although he has no insurable interest in the life of the insured. On the other hand, if the creditor . . . were given an absolute right to the proceeds, independent of the debt involved, the public policy limiting it to indemnification would be contravened . . . .[20]

If the two above mentioned factors are policy considerations in reaching the result in *Hatley,* the court should reconsider the validity of the doctrine in *Miller v. Potter*[21] that refused to allow subrogation against the assuming mortgagor when the creditor paid the premiums for insurance on the surety's life.[22]

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Labor Relations—Federal Pre-emption of Defamation Cases

The Supreme Court has held that libel and slander suits can be entertained by the courts even though the same activity is arguably subject to NLRB cognizance under the Labor Management Relations Act.[1] In *Linn v. United Plant Guard Workers*[2] an assistant general manager brought a libel action alleging that during an organizational campaign the union circulated defamatory leaflets

[20] 265 N.C. at 84, 143 S.E.2d at 268.

[21] 210 N.C. 268, 186 S.E. 350 (1936).

[22] The problem in the instant case probably could have been avoided if the parties had notified the creditor of the transfer. The General Motors Acceptance Corporation Group Creditors policy provides that "Any person who succeeds any such debtor under and by Transfer of Equity accepted and approved by the Creditor, shall be eligible from the acceptance and approval of such transfer." Letter From Fred R. Gibney to David S. Orcutt, September 30, 1966. (Mr. Gibney is Director of Group Claims for Prudential Insurance Company of America.)

[1] Labor Management Relations Act (Taft-Hartley Act) [hereinafter cited as LMRA] 61 Stat. 136 (1947), as amended, 29 U.S.C. § 141-87 (1965).

[2] Linn v. United Plant Guard Workers, 383 U.S. 53 (1966).